No. 80-780

MAR 31 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN COMPANIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether meals and lodging furnished on a regular basis by petitioner without charge to its employees while they were working on offshore oil rigs constituted "wages" for social security (FICA) and federal unemployment insurance (FUTA) tax purposes, in accordance with the governing Treasury Regulations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	2
Summary of argument	6
Argument:	
The value of meals and lodging regularly furnished by an employer to its employees without charge is includable as "wages" under the Social Security and Federal Unemployment Insurance Tax Acts	10
A. The Treasury Regulations require the inclusion of employer-furnished meals and lodging in taxable "wages" for purposes of social security and unemployment insurance	10
B. The Treasury Regulations properly implement Congress' intent to include employer-furnished meals and lodging in taxable "wages" under FICA and FUTA	13
C. The exclusion of the value of employer-furnished meals and lodging from the income tax and income tax withholding provides no basis for exclusion of such compensation from FICA and FUTA taxes	27
Conclusion	43
Appendix	1a

TABLE OF AUTHORITIES

Cases:

California Employment Commission v. *Black Foxe Military Institute*, 43 Cal. App. 2d 868, 110 P.2d 729	22

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Cases—Continued Page

Cammarano v. *United States*, 358 U.S. 498 20
Carmichael v. *Southern Coal Co.*, 301 U.S. 495..15, 22, 40
Central Illinois Public Service Co. v. *United States*, 435 U.S. 21 .....5, 8, 28, 33, 36, 38
Commissioner v. *Kowalski*, 434 U.S. 77 28
Commissioner v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981) 8, 12
Commissioner v. *Stidger*, 386 U.S. 287 13
Estate of Runnels v. *Commissioner*, 54 T.C. 762.... 37
Goldsboro Christian Schools, Inc. v. *United States*, 436 F. Supp. 1314, subsequent opinion, 43 A.F.T.R.2d ¶ 79-473 (E.D. N.C. Sept. 27, 1978), aff'd per curiam, No. 80-1473 (Feb. 24, 1981).... 19
Harris v. *Lambros*, 56 F.2d 488 29
Harris Trust & Savings Bank v. *United States*, No. 105-79T (Ct. Cl. Jan. 16, 1981) 36
Helvering v. *Davis*, 301 U.S. 619 (1937) 15, 30
Helvering v. *Winmill*, 305 U.S. 79 20
Hotel Conquistador, Inc. v. *United States*, 597 F.2d 1348, cert. denied, 444 U.S. 1032 .....6, 9, 28, 35, 36, 38
Kresge, S.S., Co. v. *United States*, 379 F.2d 309.. 5, 18
Kresge, S.S., Co. v. *United States*, 218 F. Supp. 240 21
National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 .....8, 27, 32
Oscar Mayer & Co. v. *United States*, 623 F.2d 1223 .....6, 9, 28, 35, 36
Pacific American Fisheries, Inc. v. *United States*, 138 F.2d 464 .....5, 8, 18, 20
Rainwater v. *United States*, 356 U.S. 590 42
Rodgers Dairy v. *Commissioner*, 14 T.C. 66 37
Royster Co. v. *United States*, 479 F.2d 387 ..... 34, 37
Social Security Board v. *Nierotko*, 327 U.S. 358..8, 16, 22
Steward Machine Co. v. *Davis*, 301 U.S. 548 ..... 15, 40
Thor Power Tool Co. v. *Commissioner*, 439 U.S. 522 12
United States v. *Correll*, 389 U.S. 299 .....9, 11, 13, 20, 33
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 42
United States v. *Price*, 361 U.S. 304 42
United States v. *Silk*, 331 U.S. 704 ..... 14, 16

Cases—Continued Page

United States v. *United Mine Workers*, 330 U.S. 258 42
United States v. *Southwestern Cable Co.*, 392 U.S. 157 42
United States v. *Webb, Inc.*, 397 U.S. 179 42
Waterman S.S. Corp. v. *United States*, 381 U.S. 252 42
Worthington Constr. Co. v. *Employment Sec. Div. A.D.L.*, 413 P.2d 929 22

Statutes and regulations:

Act of Aug. 28, 1950, ch. 809, Section 104(a), 64 Stat. 492 20
Current Tax Payment Act of 1943, ch. 120, Section 2, 57 Stat. 126 31
Federal Insurance Contribution Act (FICA), 26 U.S.C. 3101 *et seq.* 13, 14
26 U.S.C. 3121(a) 2, 14
Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.* 14
26 U.S.C. 3306(b) 2, 5, 6, 14, 15
Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)):
26 U.S.C. 1426 20
26 U.S.C. 1426(b) 40
26 U.S.C. 1535 19
26 U.S.C. 1607 20
26 U.S.C. 1607(c) 40
26 U.S.C. 1609 19
Internal Revenue Code of 1954 (26 U.S.C.):
26 U.S.C. 119 ..... 2, 4, 7, 17, 27, 31, 39
26 U.S.C. 162 32
26 U.S.C. 3101 ..... 13, 14
26 U.S.C. 3111 ..... 2, 13, 14
26 U.S.C. 3121(a) 5, 6, 14, 20, 28, 29
26 U.S.C. 3301 13

Statutes and regulations—Continued — Page

26 U.S.C. 3306(b) 5, 6, 20, 28, 29
26 U.S.C. 3401 ..... 2, 7, 9, 17, 28, 33
26 U.S.C. 3401(a) 9, 35
26 U.S.C. 7805 19

Revenue Act of 1942, ch. 619, 56 Stat. 798 40

Section 172, 56 Stat. 884 42
Section 465, 56 Stat. 887 30

Social Security Act of 1935, ch. 531, 49 Stat. 620 *et seq.* 13

Section 205, 49 Stat. 624 19
Section 808, 49 Stat. 638 19
Section 811, 49 Stat. 639 14
Section 811(a), 49 Stat. 639 2
Section 901, 49 Stat. 639 15
Section 907, 49 Stat. 642 15
Section 907(b), 49 Stat. 642 2
Section 908, 49 Stat. 643 19
Section 1102, 49 Stat. 647 19
Section 201, 42 U.S.C. 401 *et seq.* 14
Section 205(a), 42 U.S.C. 405(a) 19
Section 209, 42 U.S.C. 409 ..... 2, 14, 20
Section 1102, 42 U.S.C. 1302 19

Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360 25

Section 209(b), 53 Stat. 1373 40

Social Security Act Amendments of 1946, ch. 951, Section 414(a), 60 Stat. 990 20
Social Security Act Amendments of 1950, ch. 809, 64 Stat. 525 40
Pub. L. No. 94-566, Section 211(a), 90 Stat. 2676.. 15
Pub. L. No. 95-216, Section 103(b)(2), 91 Stat. 1513 15

20 C.F.R.:

Section 402.13 (1st ed. 1938) 25
Section 403.227 (1940) 23
Section 403.827 (1940) 18, 26
Section 404.1026 (1969) 18

Statutes and regulations—Continued

	Page
Section 404.1043	2, 18
Section 404.1043 (1950)	18
Section 404.1045	35
26 C.F.R.:	
Section 31.3102-1(a)	2, 13
Section 3121(a)-1(f)	2, 5, 11, 18
Section 31.3121(a)-1(h)	25, 35
Section 31.3306(b)-1	18
Section 31.3306(b)-1(f)	2, 8, 11
Section 31.3306(b)-1(h)	35
Section 31.3401(a)-1	2, 28
Section 31.3401(a)-1(b)(2)	33, 35
Section 31.3401(a)-1(b)(9)	4, 28
Miscellaneous:	
124 Cong. Rec. S12366 (daily ed. Aug. 2, 1978)	42
1940-1 Cum. Bull. 211	17, 30
1944 Cum. Bull. 550	17
1956-2 Cum. Bull. 605	18
1956-2 Cum. Bull. 721	18
1956-2 Cum. Bull. 740	18
1957-2 Cum. Bull. 630	17
2 Fed. Reg. 1276, 1280 (1937)	25
5 Fed. Reg. 3704, 3717 (1940)	25
Federal Security Agency Digest of Rulings (1947)	24, 32
H.R. Rep. No. 6, 76th Cong., 1st Sess. (1939)	14
H.R. Rep. No. 510, 78th Cong., 1st Sess. (1943)	42
H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935)	7, 15, 17
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954)	19
H.R. Rep. No. 2333, 77th Cong., 2d Sess. (1942)	40
Mim. 5657, 1944 Cum. Bull. 550	17, 23, 31
Rev. Rul. 54-593, 1954-2 Cum. Bull. 30	23, 31-32
Rev. Rul. 57-471, 1957-2 Cum. Bull. 630	17, 26
Rev. Rul. 62-150, 1962-2 Cum. Bull. 213	26, 32
Rev. Rul. 71-290, 1971-2 Cum. Bull. 340	23
Rev. Rul. 71-411, 1971-2 Cum. Bull. 103	32
Rev. Rul. 72-385, 1972-2 Cum. Bull. 536	23, 32
Rev. Rul. 76-148, 1976-1 Cum. Bull. 310	37

Miscellaneous—Continued Page

Rev. Rul. 77-80, 1977-1 Cum. Bull. 36 ..... 23, 32
S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 7, 15, 17
S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 19
S. Rep. No. 1631 (Pt. 1), 77th Cong., 2d Sess. (1942) 39, 40
S.S.R. 67-41a, 1967 Soc. Sec. Cum. Bull. 81 ..... 24, 32
S.S.R. 77-18, 1977 Soc. Sec. Cum. Bull. 84 ..... 24, 32
S.S.T. 110, 1937-1 Cum. Bull. 440 25
S.S.T. 302, 1938-1 Cum. Bull. 456 ..... 25, 26
S.S.T. 321, 1938-2 Cum. Bull. 323 23
S.S.T. 386, 1940-1 Cum. Bull. 211 .....17, 23, 30, 34
T.D. 5249, 1943 Cum. Bull. 580 30
T.D. 6190, 1956-2 Cum. Bull. 605 18
T.D. 6199, 1956-2 Cum. Bull. 721 18
Treas. Reg. 90, Art. 207 (1936) 24
Treas. Reg. 91, Art. 14 (1936) 25
Treas. Reg. 103, § 19.465-2(a) 30
Treas. Reg. 106, § 402.227 (1940) 17, 25
Treas. Reg. 107, § 403.227 (1940) 17, 25
Treas. Reg. 115, § 404.101(a) (1943) 31
Treas. Reg. 128, § 408.226 (1951) 18
1 Unempl. Ins. Rep. (CCH) ¶ 10,000 (1980) 38
1B Unempl. Ins. Rep. (CCH) ¶ 1215 (1981) 37

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OPINIONS BELOW

The order of the district court (Pet. App. 13a) is not reported. The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 624 F.2d 701.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1980 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 14, 1980, and granted on January 19, 1981 (J.A. 141a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 119, 3111, 3121(a), 3306(b), and 3401 of the Internal Revenue Code of 1954 (26 U.S.C.), and Section 209 of the Social Security Act (42 U.S.C. 409) are set forth at Appendix, *infra*, 1a-4a.[1] The relevant portions of Section 404.1043 of the Social Security Regulations (20 C.F.R.), and of Sections 31.3102-1(a), 31.3121(a)-1(f), Section 31.3306(b)-1(f), and Section 31.3401(a)-1 of the Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.), are set forth at Appendix, *infra*, 4a-9a.

STATEMENT

1. During the years in issue (1967-1969), petitioner contracted with other companies to drill oil and gas wells both on land and beneath offshore waters (Pet. App. 2a-3a; J.A. 5a-6a, 9a-10a, 22a, 42a, 73a-74a, 80a-86a). When drilling offshore, petitioner would move its rig to the owner's location, which was often as much as 60 miles from land. The rig was operated by a drilling crew that typically included from four to twelve persons. Each offshore rig operated 24 hours a day and was manned by two crews, each of which worked a 12-hour shift. Members of a crew usually remained offshore for a ten-day tour of duty aboard the rig, followed by a five-day period of leave. When a crew's new tour commenced, it re-

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[1] Section 3121(a) is derived from Section 811(a) of the Social Security Act of 1935, ch. 531, 49 Stat. 639, and is now part of the Federal Insurance Contribution Act (FICA). Section 3306(b) is derived from Section 907(b) of the Social Security Act of 1935 (ch. 531, 49 Stat. 642), and is now part of the Federal Unemployment Tax Act (FUTA).

ceived transportation to the offshore location (Pet. App. 2a; J.A. 46a-48a, 59a).

Because of the high cost of transporting crews to and from land at the beginning and end of each shift,[2] petitioner engaged a caterer to provide meals and maintain living quarters for crews working offshore. The meals and lodging cost petitioner about $6 per day per employee (J.A. 31a-32a, 106a). A rig employee typically earned about $29 per day in cash wages.[3] The eating facilities, sleeping quarters and lounge areas used for leisure activities while a crew was off duty were usually located on a vessel moored alongside the drilling platform (Pet. App. 2a; J.A. 50a, 59a-62a, 120a-121a, 140a).

Petitioner's policy to provide meals and lodging to its offshore rig employees was unilateral and prompted by considerations of economy. It was not a result of either individual or collective bargaining. Petitioner furnished identical meals and facilities on a regular basis to all employees working offshore regardless of their status or rate of pay. An employee who for any reason did not elect to eat meals furnished did not receive an allowance in lieu of the meals (Pet. App. 2a; J.A. 125a-126a, 139a).

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[2] The cost of providing transportation to shore at the beginning and end of each shift would have been $275 to $350 per day for each crew, or approximately $25 per man (J.A. 136a). Although the court of appeals indicated (Pet. App. 2a) that petitioner provided rig-to-shore transportation for its employees, the record indicates that this expense was usually borne by the oil companies with which petitioner contracted (J.A. 75a-76a, 81a, 84a).

[3] An employee earning $2.06 per hour (J.A. 28a) would earn $28.84 for a 12-hour shift, computed with four hour's overtime at a time-and-a-half rate.

Petitioner did not include the value of the meals and lodging in the employees' wages base for purposes of computing (1) the amount of old-age, survivorship, and disability (FICA) taxes to be paid by it and its employees, and (2) the amount of unemployment insurance (FUTA) taxes to be paid by it (J.A. 6a, 9a). Upon examination of petitioner's tax returns for 1967-1969, the Internal Revenue Service added the fair value of the meals and lodging ($6 per day) to the FICA and FUTA wages bases of the offshore rig employees (J.A. 12a-15a).[4] After paying the resulting additional assessments,[5] petitioner

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[4] The Service did not include the value of the meals and lodging in the employees' wages base for income tax withholding purposes because it determined that these personal benefit items were extended to the employees for petitioner's convenience and were therefore excludable from the employees' gross income under Section 119 of the Internal Revenue Code of 1954. Section 119 provides that an employee's gross income does not include the value of employer-furnished meals or lodging furnished for the convenience of the employer on the employer's premises as long as the employee is required to accept the lodging provided. Because the value of such meals and lodging was excluded from gross income, it was not part of the employees' "wages" base for purposes of income tax withholding. Section 31.3401(a)-1 (b)(9) of the Treasury Regulation on Employment Tax (26 C.F.R.), specifically excludes from "wages," for purposes of computing income tax withholding, amounts that are not included in an employee's gross income. There are no similar exclusions in the FICA and FUTA Regulations.

[5] The amount at issue in this case totals $35,198.46, plus interest (J.A. 7a). We are advised by the Internal Revenue Service that the total value of the meals and lodging provided by petitioner was approximately $265,000. Since a typical employee earned about $29 per day in cash wages and the meals and lodging cost petitioner about $6 per day per employee, the non-cash remuneration approximates 17% of the employees' total compensation.

brought this refund suit in the United States District Court for the Southern District of Texas (Pet. App. 3a; J.A. 5a-7a). The district court granted summary judgment for the government (Pet. App. 13a).

2. The court of appeals affirmed (Pet. App. 1a-12a). It first observed that the term "wages" for purposes of FICA and FUTA is broadly defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." See 26 U.S.C. 3121(a), 3306(b). The court then noted that since 1940, the Commissioner's Regulations have excluded from wages facilities or privileges of relatively small value furnished employees by the employer, but have included meals or lodging of appreciable value furnished to seamen or other employees aboard vessels. See Treasury Regulations on Employment Tax, Sections 31.3121(a)-1 (f), 31.3306(b)-1(f) (26 C.F.R.) (Pet. App. 4a-5a).

The court of appeals upheld the Commissioner's Regulations as consistent with the statute. In so ruling, the court followed similar decisions upholding the includability of meals and lodging under FICA and FUTA in *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (9th Cir. 1943); and *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967) (Pet. App. 6a). The court noted that such meals and lodging furnished for the convenience of the employer are excluded from "wages" for purposes of income tax withholding, but held that this exclusion does not in any way qualify the FICA and FUTA definition of wages. The court of appeals accordingly found *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), to be inapplicable. There, this Court held that an employer's reimbursement for lunch expenses of employees was not "wages" subject

to income tax withholding. The court of appeals explained that "a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payment to employees, it is unnecessary to withhold taxes from these payments" (Pet. App. 7a).

In so ruling, the court of appeals acknowledged that its decision conflicted with *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980), and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980), which respectively held that the value of meals furnished hotel and restaurant employees and of company cars furnished to employees at far below-cost for personal use are not "wages" for purposes of FICA and FUTA. However, the court rejected the central premise of the Court of Claims and the Seventh Circuit in those cases, *viz.* that if an item is excludable from "wages" for income tax withholding purposes, it is likewise excludable for FICA and FUTA tax purposes. The court below accordingly was "unable to subscribe to [the] conclusion * * * that the same words used in different statutes must mean the same thing and that, therefore Congress intended to deny interpretative power to the Secretary" (Pet. App. 11a).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the meals and lodging petitioner furnished its offshore rig employees are includable in their "wages" for purposes of the social security (FICA) and unemployment insurance (FUTA) taxes.

Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 (26 U.S.C.) broadly define

"wages" for purposes of FICA and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." In enacting the social security taxes, Congress intended to impose the excises on a broad range of employer-furnished remuneration. The Committee Reports state that wages include compensation for services paid in any form, such as "room" and "board." Because the purpose of the Social Security Act was "to reduce destitution and dependence," the "wages" base was defined in expansive terms in order to vindicate the important social goals of the legislation. H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 2 (1935).

Accordingly, since 1940, the FICA and FUTA Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished for the "convenience of the employer" and is thereby excluded from gross income under Section 119 and from "wages" for federal income tax withholding purposes under Section 3401 of the Internal Revenue Code of 1954 (26 U.S.C.). The fact that the term "wages" is used in the statutes for FICA, FUTA, and income tax withholding does not, as petitioner contends, require the conclusion that "wages" has the identical meaning under the three statutes. As the court of appeals correctly explained (Pet. App. 7a), "a rationale is not difficult to surmise. The purpose of withholding is to set aside the amount needed for income tax. If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments." Moreover, the fact that items of compensation may be includable in the "wages" base for FICA and FUTA tax purposes

even though excludable from gross income for income tax purposes is consistent with the broad social welfare goals of the Social Security program. See *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946); *United States* v. *Silk*, 331 U.S. 704 (1947).

The question in this case is controlled by Treasury Regulations that explicitly provide for the inclusion in FICA and FUTA wages of "the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen aboard vessels" (26 C.F.R. 31.3306(b)-1(f)). These Regulations were promulgated pursuant to specific statutory language and congressional delegation of authority, are consistent with the legislative history, and have stood substantially unchanged for 40 years. During this period, the Ninth Circuit upheld the inclusion of the value of employer-furnished meals in FICA and FUTA (*Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (1943)) and Congress then reenacted the statute. The fact that for a brief earlier period (1936-1940) the FUTA Regulations had provided for the exclusion of the value of such meals does not cast doubt upon the validity of the Regulations that have governed the employment tax area for more than 40 years, or the application of the Regulations to employers such as petitioner. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 484-485 (1979). Since the Regulations are reasonable and consistent with the statute, they are entitled to great deference and should be upheld. *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12, and cases cited therein.

2. This Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), does not bear upon the question presented in this case. There, the Court held that an employer's reimburse-

ment for 1963 lunch expenses of employees on non-overnight company travel did not constitute "wages" subject to withholding by the employer within the meaning of Section 3401(a) of the Internal Revenue Code of 1954.

But *Central Illinois Public Service Co.* turned on the fact that the pertinent Treasury Regulations excluded from the concept of wages, for purposes of *income* tax withholding, amounts paid for all travel or other business expenses, without regard to whether the travel was away from home overnight. In these circumstances, the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32).

Here, in marked contrast, the Treasury Regulations and the published rulings extant during the yeras at issue unambiguously require the inclusion of all meals (and lodging) of appreciable value in the FICA and FUTA "wages" tax base. The Court of Claims in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (1979), cert. denied, 444 U.S. 1032 (1980), and the Seventh Circuit in *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (1980), therefore erred in concluding that *Central Illinois Public Service Co.* undermined the authoritative force of the governing Treasury Regulations. As the court below succinctly put it in similarly distinguishing *Central Illinois Public Service Co.*, "[t]he factors considered [in that case] * * * do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations, is invalid" (Pet. App. 10a; footnote omitted).

ARGUMENT

THE VALUE OF MEALS AND LODGING REGULARLY FURNISHED BY AN EMPLOYER TO ITS EMPLOYEES WITHOUT CHARGE IS INCLUDABLE AS "WAGES" UNDER THE SOCIAL SECURITY AND FEDERAL UNEMPLOYMENT INSURANCE TAX ACTS

A. The Treasury Regulations Require the Inclusion of Employer-Furnished Meals and Lodging in Taxable "Wages" For Purposes of Social Security and Unemployment Insurance

This case presents an important question, on which the lower courts have divided, concerning the scope of the "wages" tax base for purposes of social security and unemployment insurance under the Federal Insurance Contributions Act (FICA), and the Federal Unemployment Tax Act (FUTA).

Congress has defined "wages" for purposes of the FICA and FUTA tax provisions as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." Given this broad definition, it is beyond dispute that employer-furnished meals and lodging fit comfortably within the statutory formulation. But we do not rest our case for includability on a statutory construction of our own making. As we shall show in greater detail (pages 17-22, *infra*), the case for includability is squarely supported by Regulations that have been extant for more than 40 years and are therefore well known to affected employers such as petitioner. Moreover, the Regulations have stood virtually unchanged during several reenactments of the statute. In these circumstances, "[t]he role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations

fall within his authority to implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S. 299, 307 (1967).

Here, the court of appeals upheld the validity of longstanding governing Treasury Regulations, in ruling that the value of meals and lodging furnished by petitioner without charge to its employees on a regular basis while they were working on offshore oil rigs constituted "wages" for social security (FICA) and federal unemployment insurance (FUTA) tax purposes. There is no room for debate on whether the Regulations in question are applicable to the facts of this case. They require that, for social security and and unemployment tax purposes, the value of meals or lodging furnished by an employer ordinarily constitutes taxable "wages." Moreover, the requirement of includability is specifically directed to the precise facts of this case. For purposes of FICA, Treasury Regulations Section 31.3121(a)-1(f) (26 C.F.R.), and its counterpart for purposes of FUTA, Section 31.3306(b)-1(f) (26 C.F.R.), prescribe the inclusion in "wages" of "the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the remuneration of such employees." If, as we submit, the Regulations are a reasonable interpretation of the statute, that is the end of the matter and the decision below should be affirmed. Thus, the question before the Court necessarily turns on the Secretary's authority to issue such Regulations interpreting the statutory term "wages" to include meals and lodging furnished by an employer in these circumstances.

The existence of controlling Treasury Regulations requiring the includability of meals and lodging imposes a heavy burden on petitioner who seeks to

exclude such compensation from the FICA and FUTA tax. It must show that the Regulations are unreasonable and plainly inconsistent with the statute. In our view, it has done neither. As a unanimous Court reaffirmed only this Term in *Commissioner* v. *Portland Cement Co.*, No. 79-1907 (Mar. 3, 1981), slip op. 12, with respect to the substantial weight to be given such Regulations—

> These regulations command our respect for Congress has delegated to the Secretary of the Treasury, not to this Court, the task of "administering the tax laws of the Nation." *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973); accord, *United States* v. *Correll*, 389 U.S. 299, 307 (1967); see 26 U.S.C. § 7805(a). We therefore must defer to Treasury Regulations that "implement the congressional mandate in some reasonable manner." *United States* v. *Correll*, 389 U.S., at 307; accord, *National Muffler Dealers Assn.* v. *United States*, 440 U.S. 472, 476-477 (1979). To put the same principle conversely, Treasury Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); accord, *Fulman* v. *United States*, 434 U.S. 528, 533 (1978); *Bingler* v. *Johnson*, 394 U.S. 741, 759-761 (1969).

See also *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 533 n.11 (1979).

Indeed, the Court's customary deference to Treasury Regulations is particularly appropriate in this case because the Regulations at issue were promulgated pursuant to specific congressional delegations of authority to deal with the "limitless factual vari-

ations" (*United States* v. *Correll, supra*, 389 U.S. at 307) in the area of employee compensation. Hence, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments" (*Commissioner* v. *Stidger*, 386 U.S. 287, 296 (1967)) and to promulgate rules applying statutes of general application to specific situations. We turn now to a discussion of the statutory and administrative history of the question which we believe demonstrates that the Commissioner's Regulations here fall well within his authority to interpret the statute in a reasonable manner consistent with the congressional mandate.

B. The Treasury Regulations Properly Implement Congress' Intent to Include Employer-Furnished Meals and Lodging in Taxable "Wages" under FICA and FUTA

1. Sections 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.) impose employment taxes upon employers based upon the amount of "wages" paid to their employees. Section 3101 of the Code also imposes an employment tax on the "wages" of each individual employee. That tax is withheld and remitted to the government by the employer (Treasury Regulations on Employment Tax (1954 Code), Section 31.3102-1(a) (26 C.F.R.), Appendix, *infra*, 6a). Both of these taxes were enacted in 1935 as part of the Social Security Act, ch. 531, 49 Stat. 620, in order to provide old-age, survivorship, disability, and unemployment benefits to workers. In 1954, the old-age, survivorship and disability taxes were codified as the Federal Insurance Contribution Act (FICA) (26 U.S.C. 3101 *et seq.*); the unemploy-

ment taxes (Section 3301 *et seq.*) were likewise codified as the Federal Unemployment Tax Act (FUTA).[6]

The employee's "wages" constitute the base for the FICA and FUTA taxes under Sections 3121(a) and 3306(b) of the Code, and for old-age, survivorship and disability (OASDI) benefits under Title II of the Social Security Act (42 U.S.C. 401 *et seq.*) (see *United States* v. *Silk*, 331 U.S. 704, 711 (1947)). Under Title II, the Internal Revenue Service regularly reports to the Social Security Administration the amount of each employee's "wages" on which taxes have been paid. These reported amounts serve as the basis for computing each employee's old-age, survivorship, and disability benefits.

Under the identical Sections 3121(a) and 3306(b) of the Internal Revenue Code of 1954 (26 U.S.C.) and Section 209 of the Social Security Act (42 U.S.C. 409) (Appendix, *infra*, 4a), "wages" are defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash * * *." Sections 3101 and 3111 (Appendix, *infra*, 2a) impose the FICA taxes on employers and employees with respect to stated percentages of the employees' "wages."[7] During the years

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[6] The old-age and disability tax provisions of Title VIII of the Social Security Act of 1935, and the unemployment compensation tax provision of Title IX of the Act, were recodified as Chapter 9 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). H.R. Rep. No. 6, 76th Cong., 1st Sess. 3-4 (1939). These Social Security taxes were then incorporated into Subtitle C of the Internal Revenue Code of 1954, 26 U.S.C. 3101 *et seq.*, as the Federal Insurance Contribution Act and the Federal Unemployment Tax Act.

[7] The FICA tax was originally imposed on the first $3,000 of each employee's annual wages. Section 811 (ch. 531, 49 Stat. 639). As of 1980, the tax was imposed on the first

at issue, Section 3306(b) imposed the FUTA tax on employers with respect to the first $3,000 of "wages" paid to an employee.[8]

In enacting these employment taxes, Congress intended to impose the excises on a broad range of employer-furnished remuneration in order to accomplish the exigent social purposes of the Social Security Act. *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937). As the Committee Reports state (H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935))[9]:

> The need for legislation on the subject of social security is apparent at this time. On every hand the lack of such security is evidenced by human suffering, weakened morale, and increased public expenditures.
>
> * * * We must relieve the existing distress and should devise measures to reduce destitution and dependency in the future.

Recent increases in the employment tax rates and maximum wage base and public discussion concerning the solvency of the social security trust fund confirm with emphatic urgency the importance of the employment excise taxes in funding for the benefits under the Social Security Act. As this Court stated in

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$25,900 of annual wages. In 1981, the tax and benefit base was increased to $29,700. Pub. L. No. 95-216, Section 103 (b)(2), 91 Stat. 1513.

[8] Originally, the FUTA unemployment tax was imposed on the entire year's wages. Sections 901, 907 (ch. 531, 49 Stat. 639, 642). As of 1978, the tax is imposed on the first $6,000 of annual wages. Pub. L. No. 94-566, Section 211(a), 90 Stat. 2676.

[9] H.R. Rep. No. 615, 74th Cong., 1st Sess. 3 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 2 (1935). See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937).

United States v. *Silk*, 331 U.S. 704, 711 (1947), "[The] relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence." Hence, the Court recognized that "As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation * * * would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation (footnote omitted)" (*id.* at 712).

The Court has therefore consistently construed the Social Security Act to ensure that all forms of compensation are included in taxable "wages." Thus, in *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), the Court held that the Social Security Act should be liberally construed to include a back pay award in the wages base, even though the affected employee had not worked during the period to which the back pay related. In addressing the statutory definition of "employment" as "any service, of whatever nature, performed within the United States by an employee for his employer," the Court concluded that *id.* at 365-366 " 'service' as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer [footnote omitted]."

The broad statutory definition of "employment" and "service" on which the Court relied in *Nierotko* to vindicate the goals of the Social Security Act, is likewise reflected in Congress' plainly stated intention to include in the tax and benefit base a broad

range of personal benefit items, provided without charge by an employer to its employees, where such benefits arise out of the employer-employee relationship.[10] Thus, the pertinent committee report (H.R. Rep. No. 615, *supra*, at 32) explicitly stated that "Wages include not only the cash payments made to the employee for work done, but also compensation for services in any other form, *such as room, board, etc.*" (emphasis supplied). See also S. Rep. No. 628, *supra*, at 49.

2. a. Since 1940, the Treasury Regulations under FICA and FUTA have consistently implemented Congress' intention to include all forms of non-cash remuneration in the wage tax base. Those Regulations have defined "wages" to mean "all remuneration for employment," even if such remuneration is furnished in the form of meals and lodging for the "convenience of the employer" and might therefore be excludable from wages for federal income tax withholding purposes under Sections 119 and 3401 of the Internal Revenue Code of 1954 (26 U.S.C.) Appendix, *infra*, 1a, 4a.[11] The OASDI Regulations issued since

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[10] Petitioner (Br. 17-18) cites *Nierotko* as a case where this Court held "invalid" a Social Security Regulation which excluded back pay from taxable "wages." But no Regulation was involved in *Nierotko*. The Social Security Board's position rested on a 1942 "minute" of the Board, which in turn relied upon a 1937 "Office Decision" of the Bureau of Internal Revenue and a court decision holding that back pay awards were not triable by a jury (see 327 U.S. at 367-370). There can be little doubt these authorities were entitled to far less deference than the Regulations involved here.

[11] See S.S.T. 386, 1940-1 Cum. Bull. 211; Mim. 5657, 1944 Cum. Bull. 550; and Rev. Rul. 57-471, 1957-2 Cum. Bull. 630, all explaining Treas. Reg. 106, § 402.227 (1940) (FICA) and Treas. Reg. 107, § 403.227 (1940) (FUTA). These 1940 FICA Regulations were carried forward substantially un-

1940 by the Social Security benefit agencies are to the same effect.[12] All of these Regulations specify that, for Social Security tax and benefit purposes, the value of all meals or lodging of appreciable value furnished by an employer ordinarily constitutes taxable wages. For purposes of this case, the pertinent portion of Treasury Regulations (Section 31.3121(a)-1(f) (26 C.F.R.) (emphasis supplied)) provides:[13]

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or fur-

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changed in Treas. Reg. 128, § 408.226 (1951). The current Regulations were promulgated in 1956. T.D. 6190, 1956-2 Cum. Bull. 605, 619 (FICA); T.D. 6199, 1956-2 Cum. Bull. 721, 740 (FUTA). *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464, 465 (9th Cir. 1943); *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967).

[12] Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act, Section 403.827 (20 C.F.R. (1940)); Social Security Administration Regulations on Federal Old Age, Survivors and Disability Insurance, Section 404.1026 (20 C.F.R. (1969)); Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (1950), Section 404.1043 (20 C.F.R.)).

[13] Section 31.3306(b)-1 of the Treasury Regulations on Employment Tax, Appendix, *infra*, 7a-8a, and Section 404.1043 of the Social Security Regulations on Old-Age, Survivors, and Disability Insurance, Appendix, *infra*, 4a-5a, which define wages respectively for FUTA and Social Security (OASDI) benefit purposes, are essentially identical.

> nished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. *The term "facilities or privileges," however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.*

These Regulations were issued pursuant to express congressional delegations of authority to the Secretary of the Treasury and the Social Security Board to establish the correlative rules necessary to administer the statutory tax and benefit program.[14] Moreover, they are entitled to special deference insofar as they have been repromulgated without substan-

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[14] The legislative delegations with respect to the tax provisions were contained in Sections 808, 908 and 1102 of the Social Security Act of 1935 (ch. 531, 49 Stat. 638, 643, 647). Section 1102 is now codified as 42 U.S.C. 1302. Sections 808 and 908 were reenacted respectively as Sections 1535 and 1609 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)). In the Internal Revenue Code of 1954, Sections 808 and 908 were not retained in separate sections. Instead, they were incorporated into Section 7805 of the Internal Revenue Code of 1954 (26 U.S.C.), without any change in meaning or scope. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A324-A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 484 (1954). See *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F. Supp. 1314, 1322 (E.D. N.C. 1977), subsequent opinion, 43 A.F.T.R.2d (P-H) ¶ 79-473, at 872 & n.12 (E.D. N.C. Sept. 27, 1978), aff'd per curiam, No. 80-1473 (4th Cir. Feb. 24, 1981).

The legislative delegations with respect to the benefit statutes were contained in Sections 205 and 1102 of the Act (ch. 531, 49 Stat. 624, 647). They are now codified as 42 U.S.C. 405(a) and 1302.

tial change for more than 40 years through reenactments of the underlying statutes.[15] In these circumstances, we submit that "the Regulations have acquired the force of law." *Cammarano* v. *United States*, 358 U.S. 498, 510 (1959). As the Court stated in *United States* v. *Correll*, 389 U.S. 299, 305 (1967), "Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law." See also *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

b. Indeed, the reenactment of the employment tax statutes in 1954 has even greater significance in light of the decision of the Ninth Circuit in *Pacific American Fisheries, Inc.* v. *United States*, 138 F.2d 464 (1943). There, the court held that the value of meals and lodging furnished to Alaska cannery workers was includable in wages for social security tax and benefit purposes. As the court explained, the statutory term "wages" necessarily includes the value of employer-furnished meals and lodging because Congress intended to provide each wage-earner with the broadest measure of old-age security, unemployment insurance, and security for minor dependents. In so ruling,

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[15] Section 1426 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), under which the FICA Regulation was originally promulgated, was reenacted as Section 3121(a) of the 1954 Code. Section 1607 of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), under which the FUTA Regulation was originally issued, was reenacted as Section 3306(b) of the 1954 Code. Section 209 of the Social Security Act, *supra*, under which the Social Security OASDI Regulations were originally issued, was reenacted in the Social Security Act Amendments of 1946, ch. 951, Section 414(a), 60 Stat. 990 and in the Act of Aug. 28, 1950, ch. 809, Section 104(a), 64 Stat. 492.

the court distinguished the provisions for withholding of income taxes from "wages," which are levied to defray the expenses of government (*id.* at 465). The Ninth Circuit therefore concluded that the convenience-of-the-employer exclusion of the value of such meals and lodging from the income tax could not be imported into the social security tax system. There is no reason to doubt that Congress was aware of the *Pacific American Fisheries* decision at the time it reenacted the underlying statutes in 1954.

The Sixth Circuit upheld the validity of the Regulations on the basis of the *Pacific American Fisheries* rationale. In *S.S. Kresge Co.* v. *United States*, 218 F. Supp. 240, 243 (E.D. Mich. 1963), the court held that the value of one free meal a day, which cost the employer a maximum of 30 cents was includable in wages for social security tax purposes. In so ruling, the court expressly relied upon *Pacific American Fisheries*, stating that "social security taxes * * * help finance a program of social insurance whereby benefits may be paid to the retired and disabled and their dependents" while the income tax exclusion for meals furnished for the convenience of the employer was solely intended to be "a method by which tax relief from the payment of income taxes is provided to an employee. * * *" In an identical case involving a later year, the Sixth Circuit expressly approved the district court's opinion. *S.S. Kresge Co.* v. *United States*, 379 F.2d 309 (6th Cir. 1967).[16]

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[16] Contrary to petitioner's argument (Br. 24-27), *Pacific American Fisheries* and *S.S. Kresge* cannot be distinguished on the ground that the courts there found a specific quid pro quo between the employees' rendering of services and the furnishing of free meals and lodging. As the court below stated (Pet. App. 6a), although the Ninth and Sixth Circuits

And in *Goldsboro Christian Schools, Inc.* v. *United States, supra,* the Fourth Circuit rendered the most recent decision upholding the Regulations at issue in this case. There, it ruled that the value of lodging furnished without charge to teachers constitutes taxable wages for FICA and FUTA tax purposes.[17]

Finally, as the decision below correctly pointed out (Pet. App. 4a-5a n.5), the body of published rulings by the Commissioner at the time of the 1954 reenact-

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relied upon the existence of a quid pro quo nexus as an alternative basis for their decisions, they rested their conclusions primarily on the legislative history and Regulations setting forth the broad scope of the statutory term "wages." Indeed, in holding in *Social Security Board* v. *Nierotko, supra,* 327 U.S. 358 (1946), that a back pay award was includable as taxable wages, this Court rejected much the same argument that wages must represent a quid pro quo for specific services.

[17] Decisions under virtually identical state unemployment statutes are to the same effect. In *California Employment Commission* v. *Black Foxe Military Institute,* 43 Cal. App. 2d 868, 872, 110 P. 2d 729, 732 (App. Dep't Super. Ct. 1941), the court stated that "It is important to the attainment of the * * * [purposes of the unemployment statutory scheme] that the real compensation be not minimized or concealed by embodying it in other forms than money payments." The court accordingly held that the value of room and board furnished to employees of a boarding school was includable in wages, regardless of the excludability of such convenience-of-the-employer benefits under the income tax. Accord, *Worthington Constr. Co.* v. *Employment Sec. Div., A.D.L.,* 413 P.2d 929 (Alaska 1966) (value of convenience-of-the-employer room and board furnished to construction workers includable in wages under the unemployment statutes).

Most of the federal FUTA tax liability of each employer is offset by a credit for the state unemployment tax on "wages;" the employer must pay this state tax under its respective state unemployment tax law, which must conform to requirements established by federal law. See *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495 (1937).

ment of the social security tax statutes was fully in accord with the *Pacific American Fisheries* decision. In 1940, almost simultaneously with the promulgation of the FICA and FUTA Regulations, the Commissioner ruled that meals and lodging furnished to the officers and crew of a steamship company constituted taxable wages under FICA and FUTA. S.S.T. 386, 1940-1 Cum. Bull. 211.[18] Accord: Rev. Rul. 71-290, 1971-2 Cum. Bull. 340. In 1944 and again in 1954, the Commissioner of Internal Revenue explained in some detail that employer-furnished meals and lodging were included in FICA and FUTA wages, despite their exclusion under the convenience-of-the-employer rule from wages for income tax purposes. Mim. 5657, 1944 Cum. Bull. 550; Rev. Rul. 54-593, 1954-2 Cum. Bull. 30. Meals and lodging furnished without charge to officers and crew aboard fishing schooners, for the convenience of the employer, were held to be includable in FICA and FUTA wages in Rev. Rul. 72-385, 1972-2 Cum. Bull. 536, 538.[19]

Moreover, the published position of the Social Security OASDI agencies has been consistently in ac-

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[18] Section 403.227 of the 1940 FUTA Regulations omitted the phrase "or to seamen or other employees aboard vessels." The phrase was inserted in the FUTA Regulations when the current Regulations were promulgated in 1956. However, in S.S.T. 386, *supra*, the Service explained that the phrase was omitted in the FUTA Regulations because an earlier FUTA ruling, S.S.T. 321, 1938-2 Cum. Bull. 323, had already held that the value of room and board was includable in FUTA wages.

[19] Similarly, the Internal Revenue Service has ruled that the value of meals furnished to religious leaders for the convenience of their employer is includable in FICA and FUTA wages. Rev. Rul. 77-80, 1977-1 Cum. Bull. 36.

cord with that of the Commissioner of Internal Revenue. In 1947, the General Counsel of the Federal Security Agency ruled that wages for FICA and FUTA purposes should include the value of meals and lodging furnished for the convenience of the employer to workers on 24-hour call at an isolated power plant. *Federal Security Agency Digest of Rulings* (OASI), ¶ OB 1020.1 (GC-41) (1947). In S.S.R. 67-41a, 1967 Soc. Sec. Cum. Bull. 81, the Social Security Appeals Council held that free meals and lodging furnished to a housekeeper in a Catholic rectory must be included in her wages benefit base. And in S.S.R. 77-18, 1977 Soc. Sec. Cum. Bull. 84, the Social Security Commissioner held that free lodging furnished to state park rangers, who were required to live in parks, must be included in their wages for purposes of voluntary contribution assessments made against state participation in the system.

3. Contrary to petitioner's argument (Br. 10-11, 13-18), the fact that an early pre-1940 version of the unemployment tax (FUTA) Regulations briefly provided for exclusion of meals furnished for the convenience of the employer does not constitute a "recognition" by the government that meals and lodging are now excludable from the FICA and FUTA "wages" tax base.

The Regulation to which petitioner refers (Br. 10) —Treas. Reg. 90, Art. 207 (1936)—provided for FUTA purposes that "facilities or privileges (such as * * * cafeterias, restaurants * * *), furnished or offered by an employer to his employees generally, are not considered as remuneration for services if such facilities or privileges are offered or furnished by the employer merely as a convenience to the employer * * *." There was, however, no comparable conven-

ience-of-the-employer exclusion under the Regulations interpreting the OASDI tax provisions of Title VIII of the Social Security Act (Treas. Reg. 91, Art. 14 (1936)), or under the OASDI benefit Regulations (Section 402.13 of the Social Security Board Regulations on Federal Old-Age Benefits (20 C.F.R., 1st ed. 1938)) (2 Fed. Reg. 1276, 1280 (1937)).

The early FUTA Regulation incorporating the convenience-of-the-employer rule was the authority upon which some rulings were issued holding that the value of meals was excludable from wages. For example, in 1938, the Service ruled that free lunch privileges were not taxable under FICA and FUTA. S.S.T. 302, 1938-1 Cum. Bull. 456 (free cafeteria meals excludable from taxable wages). See also S.S.T. 110, 1937-1 Cum. Bull. 440 (supper money paid to employees working overtime for the convenience of the employer excludable from taxable wages).

But the 1936 FUTA Regulation adopting the convenience-of-employer rule and the attendant rulings which applied it were short-lived. After the enactment of the Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360, new FICA and FUTA Regulations were issued in 1940, which omitted the convenience-of-the-employer exclusion. The text of the 1940 Regulations was virtually identical to that of the present Regulations governing this case. See Treas. Reg. 106, § 402.227 (1940) (FICA); Treas. Reg. 107, § 403.227 (1940) (FUTA). (See 5 Fed. Reg. 3704, 3717 (1940).)[20]

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[20] In the same year, the Social Security Board amended its Regulation to conform to the Treasury Regulations. See Social Security Board Regulations on Federal Old-Age and Survivors Insurance under Title II of the Social Security Act,

In sum, the FICA and FUTA Regulations have stood without change for more than 40 years through a reenactment of the statute, during which time they have consistently rejected the applicability of the convenience-of-the-employer exclusion to the definition of "wages." The fact that for a brief four-year period (1936-1940) the FUTA Regulation applied a convenience-of-the-employer rule does not undermine

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Section 403.827 (20 C.F.R. (1940)). With the issuance of the 1940 Regulations, the rulings that were based upon the convenience-of-the-employer rule were, with one exception, revoked.

The single exception was S.S.T. 302, *supra*, which ruled that the value of cafeteria meals to bank employees was excludable from FICA and FUTA wages. In 1957, the Service ruled that the value of free meals furnished to employees in the restaurant industry was includable in wages for Social Security tax purposes. Rev. Rul. 57-471, 1957-2 Cum. Bull. 630. But the ruling noted that S.S.T. 302 had never been formally revoked, and went on to state that banks and trust companies—the narrow class of employers involved in S.S.T. 302—could continue to exclude the value of cafeteria lunches from their employees' wages. In 1962, the Service determined that S.S.T. 302 was in irreconcilable conflict with the 1940 and 1956 FICA and FUTA Regulations. It therefore formally revoked S.S.T. 302, reaffirming that all meals of appreciable value are includable in the Social Security wages base. Rev. Rul. 62-150, 1962-2 Cum. Bull. 213. That has been the Service's consistent position to the present day. Whatever confusion may have been engendered by the Service's failure to revoke S.S.T. 302 regarding the includability of the value of a workday cafeteria meal furnished without charge to bank and trust company employees, that ruling has no application to this case involving the value of three meals per day, plus lodging, furnished to oil rig workers. At all events, S.S.T. 302, *supra*, was formally revoked in 1962, five years before the first taxable year at issue here.

the validity of the present Regulation, requiring inclusion of meals and lodging, or its application to petitioner. As the Court recently observed in *National Muffler Dealers Ass'n* v. *United States*, *supra*, 440 U.S. at 485-486, with respect to a Treasury Regulation which had likewise been amended in the early stages, but which was thereafter consistently applied for more than 50 years—

> We would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience. In *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 101 (1939), the Court acknowledged the need for flexibility and applied a 1929 regulation to a taxpayer even though the taxpayer had acted in reliance on an opposite interpretation incorporated in an earlier regulation. Here, where there is no claim that the [taxpayer] ever relied on the Commissioner's prior view, the case for accepting the later regulation as authoritative is even stronger.

C. The Exclusion of the Value of Employer-Furnished Meals and Lodging From the Income Tax and Income Tax Withholding Provides No Basis For Exclusion of Such Compensation From FICA and FUTA Taxes

1. Faced with the formidable obstacles of plain statutory language, legislative history implemented by longstanding Regulations extant during reenactment of the statutes, and supporting published rulings, petitioner counters (Br. 6-9) with the fact that the value of the meals and lodging it furnished to its employees is excludable from their gross income for income tax purposes under the convenience-of-the-employer rule of Section 119 of the Internal Revenue Code of 1954 and not subject to income tax withholding. From this premise, petitioner concludes (Br. 11-

12) that the fact that the meals and lodging are not "wages" subject to income tax withholding necessarily means that they are not "wages" subject to FICA and FUTA. As petitioner sees the matter, the statutory term "wages" for purposes of income tax withholding (26 U.S.C. 3401) has the identical meaning under the FICA and FUTA provisions (26 U.S.C. 3121(a), 3306(b)). In support of this contention, petitioner places substantial reliance (Br. 19, 24) upon this Court's decision in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978), as well as upon *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct. Cl. 1979), cert. denied, 444 U.S. 1032 (1980); and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980).

We do not quarrel with petitioner's claim that the value of the meals and lodging are excludable from its employees' income for income tax purposes under Section 119 of the Code. That statute, as the Court is doubtless aware from its decision in *Commissioner* v. *Kowalski*, 434 U.S. 77 (1977), provides that the value of any meals or lodging furnished by an employer to his employee for the convenience of the employer is excluded from the employee's gross income, if (1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of the employer as a condition of employment.

Here, the statutory conditions for exclusion under Section 119 are met because the meals and lodging are furnished on petitioner's premises and the employees are required to sleep in the quarters during their off-shore shift. As for income tax withholding, Treasury Regulations, Section 31.3401(a)-1(b)(9) (26 C.F.R.) specifically provides that "[t]he value of

any meals or lodging furnished to an employee by an employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119-1 of this chapter (Income Tax Regulations)." As the court of appeals correctly observed, the rationale underlying the exclusion of such employee benefits from income tax withholding "is not difficult to surmise. * * * If income tax is not due on some payments to employees, it is unnecessary to withhold taxes from these payments" (Pet. App. 7a).

But the exclusion of meals and lodging furnished for the convenience of the employer for income tax and income tax withholding purposes is not applicable to the social security and unemployment insurance taxes imposed by FICA and FUTA. As we have pointed out (*supra*, pages 15-17), Congress intended to include all forms of remuneration, such as "room" and "board," in the tax base under FICA and FUTA to insure that employees receive the maximum benefits available under the Act. Hence, the convenience-of-the-employer income tax exclusion under Section 119 cannot, without specific statutory or regulatory authority, exempt from FICA and FUTA those items that indisputably fit within Congress' broad definition of "wages" as "all remuneration from employment, including the cash value of all remuneration paid in any medium other than cash" (26 U.S.C. 3121(a), 3306(b)).[21] In short, FICA and FUTA are a dis-

[21] The fact that the meals and lodging in this case were furnished for the convenience of the employer is not inconsistent with their status as remuneration. Here, petitioner furnished the meals and lodging gratuitously, thus providing an element of gain to the employees, which amounted to more than one-sixth of their cash wages. Cf. *Harris* v. *Lambros*, 56 F.2d 488, 489 (D.C. Cir. 1932). Because the employees received a benefit in addition to their cash wages, they received

tinct system of taxation, with their own detailed body of statutes and Regulations, to which the income tax rules ordinarily do not apply.[22]

An unbroken line of published rulings, beginning with the promulgation of the FICA and FUTA Regulations in 1940, refutes petitioners' attempt to import the convenience of the employer income tax exclusion into the FICA and FUTA tax base on "wages." As we have pointed out (*supra*, 23), at the time the Treasury Regulations were issued in what was virtually their present form, the Internal Revenue Service ruled that wages for social security tax purposes included the value of meals and lodging furnished to the officers and crew on steamships. S.S.T. 386, *supra*. In contrast, the 1943 Regulations defining wages under the 1942 income tax withholding statute,[23] while closely tracking the language of the 1940 FICA and FUTA Regulations defining

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remuneration to that extent, despite the fact that, as petitioner points out (Br. 6-9), the remunerative aspects of the meals and lodging were collateral to the employer's convenience in furnishing them. Under the FICA and FUTA statutes, that fact is irrelevant. The taxes they impose are based upon "all remuneration," whether or not it is furnished primarily for the convenience of the employer.

[22] Petitioner argues (Br. 27-30) that the convenience-of-the-employer exclusion under the income tax is applicable for FICA and FUTA purposes because the social security tax is an "income tax." But the social security tax cannot be so characterized. It is, as this Court observed, a "special income tax" (*Helvering* v. *Davis*, *supra*, 301 U.S. at 634) that rests upon particularized social goals unlike the ordinary income levy.

[23] Section 19.465-2(a) of Treas. Reg. 103, as amended by T.D. 5249, 1943 Cum. Bull. 580, 597, interpreting Section 465 of the Revenue Act of 1942, 56 Stat. 887.

wages, omitted the requirement that the value of meals and lodging be included in "wages." Moreover, within a few months after enactment of the 1943 income tax withholding tax statute,[24] the Treasury issued Regulations[25] expressly excluding the value of convenience-of-the-employer meals and lodging from wages for purposes of income tax withholding.

Moreover, in 1944, the Commissioner ruled that the 1940 FICA and FUTA Regulations required inclusion of the value of meals and lodging furnished for the employer's convenience, while the 1943 income tax withholding Regulations required exclusion of the value of such meals and lodging. Mim. 5657, 1944 Cum. Bull. 550. This ruling followed closely on the heels of the Ninth Circuit's decision upholding the validity of the includability of employer-furnished meals for Social Security tax purposes.

Finally, the Treasury Regulations and subsequent rulings have consistently reaffirmed the distinction between income tax withholding and social security taxes with respect to the applicability of the convenience-of-the-employer rule. In 1954, the income tax exclusion for convenience-of-the-employer meals and lodging was incorporated into Section 119 of the Internal Revenue Code of 1954. As the court of appeals noted (Pet. App. 7a), the Internal Revenue Service ruled at the time of the 1954 codification that the value of convenience-of-the-employer meals and lodging was excludable only for purposes of income tax withholding and not for social security taxes. Rev. Rul. 54-593, 1954-2 Cum. Bull. 30, 31. Shortly

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[24] Section 2 of the Current Tax Payment Act of 1943, ch. 120, 57 Stat. 126.

[25] Treas. Reg. 115, Section 404.101(a), approved September 3, 1943.

thereafter, in 1956, the current FICA and FUTA Regulations were promulgated. They, of course, continue to require the inclusion of the value of the convenience-of-the-employer meals and lodging in the FICA and FUTA wage base. To this day, the Commissioner of Internal Revenue has continued to treat income tax withholding and FICA and FUTA taxes differently.[26] And the Social Security OASDI agencies have likewise consistently interpreted their virtually identical Regulations to require inclusion in the "wages" base of the value of free meals and lodging, whether or not furnished for the employer's convenience.[27]

These rulings interpreting the Regulations are entitled to great weight. As this Court observed in *National Muffler Dealers Ass'n* v. *United States*, *supra*, 440 U.S. at 484 n.19, "the plausibility and consistency of the Commissioner's interpretation are rele-

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[26] See Rev. Rul. 62-150, 1962-2 Cum. Bull. 213 (value of one or more meals a day, furnished without charge to employees, constitutes wages for FICA and FUTA purposes, but not subject to income tax withholding if the convenience-of-the-employer rules are satisfied). Accord: Rev. Rul. 71-411, 1971-2 Cum. Bull. 103. The same distinction has been applied to meals furnished without charge aboard fishing vessels (Rev. Rul. 72-385, 1972-2 Cum. Bull. 536, 538) and to lodging furnished without charge to religious leaders. Rev. Rul. 77-80, 1977-1 Cum. Bull. 36, 37.

The rulings cited by petitioner (Br. 35), relating to meals and lodging paid for by trainmen and truckers on overnight trips, have no bearing upon the validity of the FICA and FUTA Regulations at issue here. These rulings discuss only the deductibility of such expenditures by employees as business expenses under Section 162 (26 U.S.C.).

[27] *Federal Security Agency Digest of Rulings* (OASI), ¶ OB 1020.1 (GC-41) (1947); S.S.R. 77-18, 1977 Soc. Sec. Cum. Bull. 84; S.S.R. 67-41a, 1967 Soc. Sec. Cum. Bull. 81.

vant to the reasonableness of the regulation as applied here, [but] the Commissioner is otherwise free to determine how the regulation he has written should be construed."

2.a. Given the explicit requirement of the long-standing body of Treasury Regulations and rulings that the value of employer-furnished meals and lodging be included in "wages" for social security tax purposes but not for income tax withholding purposes, it is plain that *Central Illinois Public Service Co.* v. *United States*, *supra*, 435 U.S. 21, does not bear upon the FICA and FUTA tax question presented in this case. There, the Court held that an employer's reimbursement for 1963 lunch expenses incurred by employees on nonovernight company travel did not constitute "wages" subject to *income tax* withholding by their employer within the meaning of Section 3401 of the Code.

But that decision turned on the fact that the pertinent Treasury Regulation excluded from wages subject to income tax withholding amounts paid for travel or other business expenses without regard to whether the travel was away from home overnight. See Treasury Regulations, Section 31.3401(a)-1(b)(2) (26 C.F.R.) (435 U.S. at 27). In these circumstances, the Court was reluctant to impose secondary tax liability on the employer by retroactively applying the overnight rule of *United States* v. *Correll*, 389 U.S. 299 (1967), to the year 1963 when "not one regulation or ruling required withholding on any travel expense reimbursement" (435 U.S. at 32). See also *id.* at 33-38, Brennan, J., concurring; *id.* at 39, Powell, J., concurring. Here, by contrast, the Treasury Regulations and the published rulings extant during the year at issue (and for more than 40 years) unambiguously require the inclusion of meals and

lodging in the FICA and FUTA "wages" tax base.[28] Petitioner and all similarly-situated employers were therefore fully on notice of the Service's position.[29] As the court below succinctly put it in similarly distinguishing *Central Illinois Public Service Co.*, "[t]he factors considered [in that case] * * * do not decide that a purely prospective regulation, suffered for forty years by a Congress acutely attuned to tax considerations, is invalid" (Pet. App. 10a; footnote omitted).[30]

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[28] The fact that the government sought to defer proceedings in FICA and FUTA cases until this Court rendered its decision in *Central Illinois Public Service Co.* does not, as petitioner suggests (Br. 19-20), betray a concession that the case is authoritative here. Such actions were merely a precaution taken prior to the issuance of Court's opinion setting forth the grounds of the decision.

[29] Contrary to petitioner's argument (Br. 33-35)—which it did not raise in the court of appeals—the daily provision of meals and lodging at issue here is not travel reimbursement within the meaning of the FICA and FUTA counterparts of the Regulation involved in *Central Illinois Public Service Co.* Indeed, the existence of a specific Regulation requiring the inclusion of "meals and lodging furnished * * * to seamen or other employees aboard vessels," together with Regulations excluding travel reimbursements, refutes petitioner's attempted analogy. Accord: S.S.T. 386, *supra*. Moreover, petitioner's argument falls in light of Congress' plainly stated intention to include in the social security base the value of "room" and "board" furnished in kind to employees (see page 17, *supra*).

[30] *Royster Co.* v. *United States*, 479 F.2d 387 (4th Cir. 1973), upon which petitioner relies (Br. 38-40), likewise does not support its claimed exclusion from FICA and FUTA of the meals and lodging at issue here. Rather, the principal question presented in that case was the same as in *Central Illinois Public Service Co.* In *Royster Co.*, the court held that

b. If, as we submit, *Central Illinois Public Service Co.* has no bearing upon the FICA and FUTA question presented here, no basis remains for the decisions in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (Ct.Cl. 1979), cert. denied, 444 U.S. 1032 (1980), and *Oscar Mayer & Co.* v. *United States*, 623 F.2d 1223 (7th Cir. 1980). Those decisions, upon which petitioner relies (Br. 38-41), cite *Central Illinois Public Service Co.* for the proposition that the term "wages" has the identical meaning under FICA, FUTA, and income tax withholding so that employee benefits that do not constitute "wages" for income tax withholding purposes are likewise excludable from FICA and FUTA.

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payments for noon meals consumed by salesmen engaged in nonovernight travel were not "wages" under Section 3401(a) for purposes of *income* tax withholding. Since the FICA and FUTA Regulations with respect to such travel reimbursements were identical to the income tax withholding Regulations, the court further held them to be excludable from the FICA and FUTA "wages" base. See Treasury Regulations, Sections 31.3121(a)-1(h) (FICA), 31.3306(b)-1(h) (FUTA); 31.3401(a)-1(b)(2) (income tax withholding), Appendix, *infra*, 7a-9a. See also Social Security OASDI Regulations, Section 404.1045 (20 C.F.R.). Appendix, *infra*, 5a.

Here, however, the meals and lodging involved are of a nontravel character. They are therefore governed by different Regulations. Indeed, in *Goldsboro Christian Schools, Inc.* v. *United States, supra*, the Fourth Circuit recently held that the value of lodging furnished to teachers is includable in FICA and FUTA wages in accordance with the Regulations at issue here and that the convenience-of-the-employer income tax exclusion had no application. In so holding, the court distinguished its prior *Royster Co.* decision on the ground that it involved travel reimbursements covered by different Regulations.

In *Hotel Conquistador*, the Court of Claims held that the value of meals furnished to hotel and restaurant employees for the employer's convenience was not includable as "wages" for FICA and FUTA tax purposes. In so holding, the court observed that the prior appellate decisions upholding the Regulations "did not have * * * the benefit of the criteria to apply to regulations in this area, as prescribed in *Central Illinois* * * *" (597 F.2d at 1354).[31] In *Oscar Mayer & Co.*, the Seventh Circuit held that an employer's furnishing company-owned cars for the personal use of employees at less than cost did not constitute "wages" for FICA and FUTA tax purposes. The court likewise relied upon *Central Illinois Public Service Co.* and the discussion of that case by the Court of Claims in *Hotel Conquistador* (see 623 F.2d at 1226-1227). In the Seventh Circuit's view, it was unnecessary to address the question whether the FICA and FUTA Regulations applied because the below-cost automobiles did not constitute "wages" for withholding tax purposes and their value was therefore excludable from "wages" under FICA and FUTA (*id.* at 1228).[32]

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[31] Contrary to petitioner's suggestion (Br. 17 n.16), the government's decision to concede in *Harris Trust & Savings Bank* v. *United States*, No. 105-79T (Ct. Cl. Jan. 16, 1981), does not signal a reversal of its position. That case involved the FICA and FUTA tax consequences of an employer's providing below-cost cafeteria meals to its employees. However, the government's concession was based upon the practical consideration that it would have been fruitless to pursue such a case in the Court of Claims after its adverse decision in *Hotel Conquistador, Inc.* v. *United States*, 597 F.2d 1348 (1979), and this Court's denial of certiorari in that case (444 U.S. 1032 (1980)).

[32] In *Oscar Mayer & Co.*, the Seventh Circuit also observed (623 F.2d at 1227-1228) that the FICA and FUTA Regula-

But as we have pointed out (*supra*, pages 33-34), *Central Illinois Public Service Co.*, does not stand for the proposition that the term "wages" for income tax withholding has the equivalent meaning under FICA and FUTA. The decision in that case rests on the narrow ground that the withholding tax Regulations extant during the year at issue supported the lunch reimbursements as travel expenses. The fact that identical Regulations supported excludability under FICA and FUTA (see *Royster Co.* v. *United States*, *supra*) does not establish any general congruence among the three employment tax statutes with respect to the definition of "wages." Indeed,

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tions failed to provide a method of computing the "fair value" of benefits. But such computations have been made without difficulty for many years under the Regulations. Indeed, most of the states have established standard values which may be used for meals and lodging, and the Internal Revenue Service commonly gives weight to these figures in making its valuation (Rev. Rul. 76-148, 1976-1 Cum. Bull. 310). See 1B Unempl. Ins. Rep. (CCH) ¶ 1215 (1981), for a table of the values assigned by the various states.

The *amicus* YMCA of Metropolitan Hartford, Inc., predicts (Memo. 14-15) that if the government succeeds in including the value of meals and lodging in the instant case, it will seek to include a broad range of other fringe benefits in "wages," thus requiring "[e]mployers to speculate at their own risk * * * as to items subject to employment tax * * *." But no such augury is warranted. The Treasury has advised us that its settled practice is to include the value of fringe benefits in "wages" only when the law clearly requires it. The meals and lodging involved here and in *Hotel Conquistador* are specifically listed as includable wages in the legislative history of the Social Security Act. The use of company cars for personal use, which was involved in *Oscar Mayer & Co.*, has long been recognized as taxable income. *Rodgers Dairy Co.* v. *Commissioner*, 14 T.C. 66 (1950); *Estate of Runnels* v. *Commissioner*, 54 T.C. 762, 767 (1970).

such a generalization is graphically refuted by the 14-page table in 1 Unempl. Ins. Rep. (CCH) ¶ 10,000 at 171-184 (1980), which lists literally dozens of differences between the scope of "wages" for purposes of income tax withholding, and "wages" under FICA and FUTA.

In short, the definition of "wages" cannot, as petitioners would have it, be forced into a uniform mold that is applicable for income tax withholding, FICA and FUTA. Contrary to the Court of Claims and the Seventh Circuit, the fact that an item may be excluded from income tax withholding does not dictate a similar exclusion under FICA and FUTA. In fact, *Central Illinois Public Service Co.* teaches that such facile generalizations (see 435 U.S. at 29) cannot stand against the body of detailed Regulations and interpretative rulings governing the employment tax area.[33] As the court below properly concluded (Pet. App. 9a),

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[33] While the Court of Claims in *Hotel Conquistador* did not explicitly strike down the Regulations which we urge to be controlling in these cases, it concluded that the Regulations' use of the terms "generally" and "ordinarily" to characterize the circumstances under which the value of meals to such employee would constitute "wages" made them too vague to serve as a guide to employers.

But the Treasury's casting of the meals-as-wages rule as a "general" or "ordinary" proposition is simply designed to exclude the particular situation where meals are provided on a nonrecurring infrequent basis so that they do not represent a significant aspect of the employee's compensation. That is assuredly not this case. In *Hotel Conquistador*, the taxpayer provided daily meals of a prescribed character in accordance with its obligations under a labor contract and those meals constituted 8.3% of the employees' gross wages (597 F.2d at 1350). Here, as we have pointed out (page 4, note 5), the meals and lodging furnished by petitioner constituted 17% of its employees' gross income. Under these circum-

> The inquiry is not, however, merely one of semantic comparison. The words, even if identical, are not components of an algebraic equation each side of which must inevitably yield the same result. We are not engaged in a Socratic dialogue to determine whether all things bearing the same name are alike but in deciding to what extent Congress purposely limited the authority of the administrative agency by the use of these words in a consistent pattern. * * * Resolution of the issue does not turn on how we would, without further guidance, interpret the words, but on whether the construction reached by the Secretary is a permissible one.

3. Finally, nothing in the legislative history of either the witholding tax or of Section 119, cited by petitioner (Br. 10-13), supports its attempt to import the income tax convenience-of-the-employer exclusion into the FICA and FUTA definition of "wages."

To be sure, in enacting the income tax witholding provisions in 1942, Congress intended that certain "exceptions" to the Social Security tax would likewise be applicable to the withholding tax. But petitioner's quotation (Br. 10-11) of the pertinent committee report (S. Rep. No. 1631 (Pt. 1), 77th Cong., 2d Sess. 166 (1942)) omits five crucial sentences. The deleted portion demonstrates beyond question that the "identical" "exceptions" to which Congress referred

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stances, we submit, the meals plainly constitute "remuneration" within the meaning of the statute. There is no basis in either the statute or Regulations for the Court of Claims' restrictive gloss that meals are includable in "wages" only if they are of "such massive quantities of free food * * * as to compel the inference that the cash wage could not but be set lower in light of these emoluments * * *" (597 F.2d at 1352).

involved specified services performed by military personnel, agricultural labor, domestic workers, etc.,[34] and not, as petitioner urges, meals and lodging furnished for the convenience of the employer.

The full excerpt from the Committee Report (with the portions omitted by petitioner italicized) reads as follows:

> With certain specified exceptions, the term is defined to include all remuneration whether designated as salary, wages, fees, commissions, etc., and whether paid in cash or property, if paid for services performed by an employee for his employer. *Under the exceptions provided, remuneration for the following services will not be subject to collection at the source: Services performed as a member of the military or naval forces of the United States. This exception does not extend to remuneration in the form of pensions and retired pay, if such remuneration is includible in gross income under the provisions*

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[34] These services were originally excluded from Social Security coverage (Social Security Act of 1935, Section 209(b), as amended by the Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1373; Sections 1426(b) and 1607(c) of the Internal Revenue Code of 1939) for various reasons of policy and practical convenience. *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 584; *Carmichael* v. *Southern Coal Co., supra,* 301 U.S. at 513. When Congress enacted the first modern income tax withholding statute in the Revenue Act of 1942, ch. 619, 56 Stat. 798, it decided to exempt from withholding those workers and their employers who in most cases had never been subject to any withholding under the Social Security Act. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 126 (1942); S. Rep. No. 1631 (Pt. 1), *supra,* at 166. Some of these excepted services, such as those performed by some domestic workers and agricultural laborers, were later included in social security coverage. See, *e.g.*, Section 203(a), Social Security Act Amendments of 1950, ch. 809, 64 Stat. 525.

> *of section 22 of the Code. In connection with this exception, it should be noted that the definition of the term "military or naval forces of the United States," contained in section 3797(a)(15) of the Internal Revenue Code has been amended to specifically include the Women's Army Auxiliary Corps and the Women's Reserve Branch of the Naval Reserve. Exceptions are also provided with respect to remuneration paid for agricultural labor; domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; and casual labor not in the course of the employer's trade or business.* These exceptions are identical with the exceptions extended to such services for Social Security tax purposes and are intended to receive the same construction and have the same scope. *These exceptions will relieve farmers, housewives, and others from the burden of collecting and accounting for small amounts of tax and will reduce the administrative burden and cost of collection entailed in the handling of numerous returns involving only nominal amounts. Exceptions are also provided with respect to remuneration for services as an employee of a nonresident alien individual, foreign partnership, or foreign corporation if such employers are not engaged in trade or business in the United States, and remuneration for services as an employee of a foreign government or a wholly owned instrumentality thereof.*

Thus, the common set of "exceptions" for certain services has no connection with the convenience-of-the-employer exclusion for meals and lodging. It surely strains credulity to suggest that Congress would have altered the FICA and FUTA definition of "wages" by means of what is at best an oblique ref-

erence in a committee report dealing with income tax withholding.[35] There is accordingly nothing in the legislative history of any other tax provision that casts doubt upon the validity of the controlling Regu-

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[35] The excerpt from H.R. Rep. No. 510, 78th Cong., 1st Sess. 28 (1943), cited by petitioner (Br. 37), is likewise irrelevant. It simply evidences Congress' intent to coordinate the mechanical task of withholding income taxes and social security taxes. It does not address the definition of "wages" under FICA and FUTA.

The quotation by the *amicus* YMCA of Metropolitan Hartford, Inc. (Memo. 7) from this 1943 Committee Report on the 1943 income tax withholding statute—that "the general definition of the term wages in [the 1943 withholding statute] is the same as that contained in existing law"—has no bearing on this case. It merely reflects the fact that the 1943 income tax withholding provision was virtually the same as the 1942 income tax withholding provision. Cf. Revenue Act of 1942, ch. 619, Section 172, 56 Stat. 884.

Nor does the 1978 colloquy between Senators Dole and Long, upon which petitioners rely (Br. 12-13 n.10), cast doubt upon the validity of the FICA and FUTA Regulations upheld by the decision below. As petitioners acknowledge (*ibid.*), the legislative proposal then under discussion dealt with a technical amendment to the income tax exclusion for meals provided by Section 119. The legislation had no effect upon FICA and FUTA coverage. Indeed, during the same discussion, Senator Long stated that "The bill would not change present law in any other respect." 124 Cong. Rec. S12366 (daily ed. Aug. 2, 1978). At all events, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). Accord: *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963); *Waterman S.S. Corp.* v. *United States*, 381 U.S. 252, 269 (1965); *United States* v. *Webb, Inc.*, 397 U.S. 179, 194 n.21 (1970); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1958); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *Mine Workers*, 330 U.S. 258, 380-382 (1947).

lations in this case. The FICA and FUTA Regulations requiring the inclusion of employer-furnished meals and lodging should therefore be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

(a) *Meals and Lodging Furnished to Employee, His Spouse, and His Dependents, Pursuant to Employment.*—There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him, his spouse, or any of his dependents by or on behalf of his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

(b) *Special Rules.*—For purposes of subsection (a)—

(1) *Provisions of employment contract or state statute not to be determinative.*—In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

(2) *Certain factors not taken into account with respect to meals.*—In determining whether meals are furnished for the convenience of the employer, the fact that a charge is made for such meals, and the fact that the employee may accept or decline such meals shall not be taken into account.

* * * * *

SEC. 3101. RATE OF TAX.

(a) [as amended by Section 204(a)(1), of the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 836]. *Old-Age Survivors, and Disability Insurance.*—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121 (a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(3) with respect to wages received during the calendar years 1971 and 1972, the rate shall be 4.6 percent; * * *

* * * * *

SEC. 3111. RATE OF TAX.

(a) *Old-Age, Survivors, and Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

SEC. 3121. DEFINITIONS.

(a) [as amended by Section 108(b)(2) of the Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 835]. *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $7,800 with respect to employment has been paid to an individual by an employer during any calendar year, is paid to such individual by such employer during such calendar year.

* * *

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SEC. 3306. DEFINITIONS.

* * * * *

(b) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) [as amended by Section 302 of the Employment Security Amendments Act of 1970, Pub. L. No. 91-373, 84 Stat. 713] that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to $4,200 with respect to employment has been paid to an indi-

vidual by an employer during any calendar year, is paid to such individual by such employer during such calendar year. * * *

* * * * *

SEC. 3401. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

* * * * *

Social Security Act (42 U.S.C. 409):

SEC. 209. DEFINITION OF WAGES.

For the purposes of this subchapter, the term "wages" means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

Social Security Administration Regulations on Federal Old-Age, Survivors and Disability Insurance (20 C.F.R.):

Sec. 404.1043 *Facilities or privileges—meals and lodging.*

(a) Generally, facilities or privileges that an employer furnishes or offers to an employee are not considered wages if the facilities or privileges—

(1) Are of relatively small value; and

(2) Are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of the employees.

(b) The term "facilities or privileges" includes such things as entertainment, medical services, and so-called "courtesy" discounts on purchases. The term does not usually include the value of meals or lodging furnished to employees. The value of these items is wages where—

(1) It is understood by the employer and employee that the employer is to furnish to the employee meals or lodging or both on a regular basis; or

(2) The value of the items is a large part of the total pay. For example, the value of meals or lodging furnished to hospital, restaurant, or hotel employees, or to seamen or other employees aboard vessels, is generally wages because either one or both of these conditions are met.

Sec. 404.1045 *Employee expenses.*

Amounts that your employer pays you specifically—either as advances or reimbursements—for traveling or for other ordinary and necessary expenses incurred, or reasonably expected to be incurred, in your employer's business are not wages. The employer must identify these travel and other expenses either by making a separate payment or by specifically stating the separate amounts if both wages and expense allowances are combined in a single payment.

Treasury Regulations on Employment Tax (1954 Code) (26 C.F.R.):

Sec. 31.3102-1 *Collection of, and liability for, employee tax; in general.*

(a) The employer shall collect from each of his employees the employee tax with respect to wages for employment performed for the employer by the employee. The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from such wages as and when paid. (For provisions relating to the time of such payment, see § 31.3121 (a)-2.) The employer is required to collect the tax, notwithstanding the wages are paid in something other than money, and to pay over the tax in money. (As to the exclusion from wages of remuneration paid in any medium other than cash for certain types of services, see § 31.3121(a)(7)-1, relating to such remuneration paid for service not in the course of the employer's trade or business or for domestic service in a private home of the employer; and § 31.3121(a)(8)-1, relating to such remuneration paid for agricultural labor.) For provisions relating to the collection of, and liability for, employee tax in respect of tips, see § 31.3102-3.

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Sec. 31.3121(a)-1 *Wages.*

* * * * *

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for

employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

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Sec. 31.3306(b)-1 *Wages.*

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(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of

promoting the health, good will, contentment, or efficiency of his employees. The term "facilities or privileges", however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

* * * * *

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

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Sec. 31.3401(a)-1 *Wages.*

(a) *In general.* * * *

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

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(b) *Certain specific items—* * * *

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reim-

bursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

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